Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

SAMUEL H. TAKA & SYLVIA A. TAKA d/b/a S. TAKA and ALBERT ISA d/b/a ALBERT ISA NURSERY,
Petitioners,

v.

E.I. DU PONT DE NEMOURS & COMPANY; ALLEN TESHIMA; and REGINALD HASEGAWA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the requirements of due process are met when a litigant is deprived of his claims via summary judgment for failing to supply sufficient evidence to meet a new substantive standard for damages; defined and articulated by the presiding court for the first time after submission of briefs, and with no advance notice.

2. Whether the requirements of due process are met where the presiding court has imposed new requirements for submission of expert evidence in opposition to a motion for summary judgment; despite the fact the parties were only notified of these requirements after submission of briefs, and after the final deadline for providing expert submissions had already passed.

PARTIES TO THE PROCEEDING

1. Petitioners in this case are Samuel H. Taka and Sylvia A. Taka, d/b/a S. Taka and Albert Isa d/b/a Albert Isa Nursery, each adult residents of the State of Hawaii, seeking a Writ of Certiorari to correct due process violations that culminated in summary disposition of their civil claims for fraud.

2. Respondents are E. I. du Pont de Nemours and Company, Inc., and Allen Teshima, DuPont's agent in Hawaii for relevant time periods, and Reginald Hasegawa, an adult citizen of the State of Hawaii. Respondents were defendants in the civil action and were the prevailing parties by virtue of summary judgment in the state civil litigation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF APPENDICES iv

TABLE OF CITED AUTHORITIES v

STATEMENT OF JURISDICTION 1

RELEVANT CONSTITUTIONAL PROVISIONS 1

OPINIONS BELOW 2

PETITION FOR WRIT OF CERTIORARI 2

INTRODUCTION 3

STATEMENT OF THE CASE 4

A. Contextual Facts 4

B. The Hawaii Supreme Court's Decision 10

REASONS FOR GRANTING A WRIT OF CERTIORARI 23

CONCLUSION 34

TABLE OF APPENDICES
(Printed as a Separate Booklet)

Page

Opinion of the Hawaii Supreme Court of the State of Hawaii A1

Judgment certifying Petitioners' claims for appeal A119

Memorandum Decision of the Third Circuit Court of the State of Hawaii granting summary judgment A123

Order Related to Trial Procedures A126

TABLE OF CITED AUTHORITIES

Page(s)

Cases

Armstrong v. Manzo,
380 U.S. 545, 85 S. Ct. 1187 (1965)..... 28

Bachran v. Morishige,
52 Haw. 61, 469 P.2d 808 (1971)..... 12

Banker's Trust Co. v. Bethlehem Steel Corp.,
752 F.2d 874 (3d. Cir. 1985) 25

Board Of Regents Of State Colleges v. Roth,
408 U.S. 564, 92 S.Ct. 2701 (1972)..... 23

Boddie v. Connecticut,
401 U.S. 371, 91 S.Ct. 780,
28 L.Ed.2d 113 (1971)..... 24

DiSabatino v. United States Fidelity
and Guarantee Co.,
635 F.Supp. 350 (D.Del. 1986) 13

Dobison v. Bank of Hawaii,
60 Haw. 225, 587 P.2d 1234, (1978)..... 10

Dusenberry v. U.S.,
534 U.S. 161, 122 S.Ct. 694 (2002)..... 26

In re E.I. du Pont de Nemours and Co.,
918 F.Supp. 1524 (M.D. Ga., 1995), reversed,
99 F.3d 363 (11th Cir. (Ga.), 1996)..... 4

Page(s)

Exotics Hawaii-Kona, Inc., et .al. v . E. I. Du Pont De Nemours & Company, et. al., 172 P.3d 1021 (Haw. 11/21/07) 2

Exotics Hawaii-Kona v. E.I. du Pont de Nemours and Co., 104 Haw. 358, 90 P.3d 250 (Haw. 2004) 4

Hammond Packing Co. v. Arkansas, 212 U.S. 322, 29 S.Ct. 370, 53 L.Ed. 530 (1909) 23

Hardy v. Johns-Manville Sales Corp., 681 F.2d 334 (9th Cir. 1982) 25

Hawaii Community Federal Credit Union v. Keka, 94 Haw. 213, 11 P.3d 1 (2000) 11

Hormel v. Helvering, 312 U.S. 552, 61 S. Ct. 719 (1941) 23

Hovey v. Elliott, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897) 23

Jackson v. DeSoto Parish School Board, 585 F.2d 726, 730 (5th Cir. 1978) 25

Kang v. Harrington, 59 Haw. 652, 587 P.2d 285 (1978) 11

Kawamata Farms, Inc. v. United Agri. Products, et. al., 86 Haw. 214 (1997) 4,5,29

Page(s)

Living Designs, Inc. v. E. I. Dupont Nemours & Co., 431 F.3d 353 (9th Cir. 2005) cert. denied, ____ U.S. ____, 126 S. Ct. 2861 (2006) 12,13,14

Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S. Ct. 1148 (1982)..... 23,25,28

Matsuura v. Alston & Bird, 179 F.3d 1131 (9th Cir. 1999) 4-5

Matsuura v. E. I. du Pont de Nemours and Co., 102 Haw. 149, 73 P.3d 687 (Haw. 2003)..... 11

Matsuura v. E.I. du Pont de Nemours & Co., 330 F. Supp. 2d 1101 (D. Haw. 2004) 12

Miyamoto v. Lum, 104 Haw. 1, 84 P.3d 509 (2004)..... 12

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652 (1950) 26-27

Richards v. Jefferson County, Ala., 517 U.S. 793, 116 S. Ct. 1761 (1996)..... 27

Shanghai Inv. Co, Inc. v. Alteka Co., Ltd., 92 Haw. 482, 993 P.2d 516 (Haw. 2000)..... 11

Societe Internationale v. Rogers, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958)..... 24

Thompson v. Madison County Board of Education, 476 F.2d 676 (5th Cir.1973) 25

Page(s)

U.S. v. Alisal Water Corp.,
431 F.3d 643 (9th Cir. 2005) 26

U.S. v. James Daniel Good Real Prop.,
510 U.S. 43, 114 S.Ct. 492 (1993)..... 26

Windsor v. McVeigh,
93 U.S. 274, 23 L.Ed. 914 (1876)..... 23

Statutes

28 U.S.C.§ 1257..... 1

Haw. R. Civ. Proc. Rule 56(f) .....*passim*

Constitutional Provisions

U.S. CONST. art. III, § 2..... 1

U.S. CONST. amd V 23,24

U.S. CONST. amd XIV 1,23,24

STATEMENT OF JURISDICTION

The judgment of the Hawaii Supreme Court of the State of Hawaii was issued on November 21, 2007. This Court has jurisdiction over this Petition under U.S. CONST. art. III, § 2, and 28 U.S.C.§ 1257.

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property without due process of law." The Amendment is made applicable to the respective States by virtue of the Fourteenth Amendment to the United States Constitution.

OPINIONS BELOW

The Opinion of the Hawaii Supreme Court of the State of Hawaii is attached hereto at App. A1-118. The memorandum decision of the Third Circuit Court of the State of Hawaii granting summary judgment is attached hereto at App. A123-125. The Order Related to Trial Procedures referenced by the Circuit Court in its memorandum granting summary judgment is attached hereto at App. A126-128. The judgment certifying Petitioners' claims for appeal after summary judgment is attached hereto at App. A119-122.

PETITION FOR WRIT OF CERTIORARI

Petitioners Samuel H. Taka & Sylvia A. Taka d/b/a S. Taka and Albert Isa d/b/a Albert Isa Nursery respectfully petition for a writ of certiorari for review of the judgment of the Hawaii Supreme Court in Exotics Hawaii-Kona, Inc., et .al. v . E. I. Du Pont De Nemours & Company, et. al. 172 P.3d 1021 (Haw. 11/21/07) (hereinafter referred to as "Appendix A").

I.

INTRODUCTION

The instant case concerns the deprivation of claims held by two litigants who filed suit in the State of Hawaii for settlement fraud and related misconduct. Summary judgment was granted against them because the trial court, without advance warning, changed the prevailing standard for damages in these types of cases; a change it announced for the first time after the litigants had submitted their briefs in opposition to the underlying motion.

The trial court also made ex post facto changes to evidentiary requirements for experts who offered testimony on these issues; such requirements being initially articulated after the final deadlines for designating experts, and submitting expert reports had already passed.

The trial court's decision was subsequently affirmed on appeal by the Hawaii Supreme Court; despite the fact that the litigants (due to lack of notice) were denied all viable opportunity to rebut the motion for summary judgment.

STATEMENT OF THE CASE

A. Contextual Facts

This case is actually a sequel to a prior lawsuit involving the same parties. Petitioners Samuel H. Taka & Sylvia A. Taka d/b/a S. Taka and Albert Isa d/b/a Albert Isa Nursery (collectively "Petitioners") are commercial farmers who grow and sell ornamental tropical flowers in the State of Hawaii. They, along with approximately 72 other local growers, filed separate lawsuits in the Circuit Court of the Third Circuit, State of Hawaii against Respondent, E. I. du Pont de Nemours and Company ("DuPont") in 1992 and 1993, based on their usage of the latter's fungicide product, Benlate. The product did not work as specified, and caused extensive damage to their crops; resulting in severe loss and damages to their ongoing businesses. App. A2-3.[1]

The individual cases were consolidated for discovery by the Circuit Court, and (with the exception of two plaintiffs) were settled in 1994. See Exotics Hawaii-Kona v. E.I. du Pont de Nemours and Co., 104 Haw. 358, 361- 362, 90 P.3d

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[1] Additional descriptions of the relevant factual events may also be found in Kawamata Farms, Inc. v. United Agri. Products, et. al., 86 Haw. 214 (1997); Matsuura v. Alston & Bird, 179 F.3d 1131 (9th Cir. 1999); and In re E.I. du Pont de Nemours and Co., 918 F.Supp. 1524 (M.D. Ga., 1995), reversed, 99 F.3d 363 (11th Cir. (Ga.), 1996).

250 (Haw. 2004). See also, Matsuura v. Alston & Bird, 179 F.3d 1131 (9th Cir. 1999). Following trial for the two plaintiffs who refused to settle,[2] the Circuit Court actually sanctioned DuPont, and held that DuPont had "committed discovery fraud upon the . . . court and other parties," including, by definition, the Petitioners. Id. The Circuit Court found DuPont engaged in fraudulent misconduct during discovery, i.e. by (among other things) falsely withholding evidence, and improperly invoking work product immunity to resist disclosure. These rulings were subsequently affirmed, and upheld by the Hawaii Supreme Court. Kawamata Farms, Inc. v. United Agri. Products, et. al., 86 Haw. 214, 223-232, 248-252, 256-259, 948 P.2d 1055, 1064-1073, 1088-1093, 1087-1100 (1997).

After this ruling was published, a new lawsuit was filed against DuPont, alleging inter alia, fraud, fraudulent misrepresentation, negligent misrepresentation, nondisclosure, conspiracy, and punitive damages. Petitioners formally joined this lawsuit on January 6, 2000 with other farmers who had also settled their product claims before the fraud was discovered. App. A6-A9. The factual theory presented was that DuPont, through its illegal discovery tactics, had defrauded the parties, causing them to settle for far less than they would have, had the proper disclosures been made. Id. DuPont Answered the Complaint on February 14,

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[2] At the conclusion of trial, the jury found that Benlate was defective, and was the proximate cause of the plaintiffs' losses. Id. at 86 Haw. 228-229, 948 P.2d 1069-1071.

2000, and (not unexpectedly) denied all liability. App. A9.

In May of 2004, the Circuit Court entered an Order establishing deadlines for the naming of experts, and disclosure of expert reports and opinions; App. A128-126. With regard to such disclosures, the Circuit Court stated:

> IT IS FURTHER ORDERED that, considering the scope of this case and the number of plaintiffs involved, the standard deadlines for submission of expert reports shall be modified. [Petitioners], as the parties with the burden of proof, shall submit their final expert reports first. After [Petitioners] submit their final expert reports, DuPont shall be given a reasonable time to submit their final expert reports. The parties shall confer and agree upon deadlines for expert reports.
>
> IT IS FURTHER ORDERED that experts will not be allowed to testify on any matters beyond their respective reports.

App. A126-A127 (emphasis added).

Petitioners named their experts, and submitted their reports on a timely basis. App. A60-A61. Among other experts, they named

economists to substantiate the amount of damages they would have claimed had their original cases proceeded through trial. They also named their former trial attorneys to testify how DuPont's fraudulent discovery tactics had adversely impacted their settlement positions. App. A60-A61; A63-A67; A96-102.

On February 5, 2005, DuPont filed a motion for summary judgment, contending that Petitioners lacked sufficient proof to sustain their claims. App. A13. According to DuPont, Petitioners were only entitled to the difference between the settlement amounts they actually accepted, and the "fair compromise value" of their cases had the fraud not occurred. App. A14. DuPont also argued that only "qualified" attorneys could competently testify as experts in this respect, and that Petitioners' expert reports failed to pinpoint or substantiate this "value." App. A15.

Petitioners responded that there was no basis to grant DuPont's Motion since it was completely at odds with existing Hawaii law. App. A16; A30; A90. Petitioners argued that prevailing law permitted recovery for all damages proximately arising from the offender's fraud; no Hawaii appellate court case had ever established "fair settlement value," or "fair compromise value" as a limitation on such damages. Nor had the Hawaii appellate courts ever held that evidence of this element could only be adduced through expert

testimony, and/or that such experts had to be "qualified attorneys." Id.

The above notwithstanding, the Circuit Court granted DuPont's Motion on February 28, 2005, stating:

> The Court finds that, as a matter of law, when a plaintiff claims to have been fraudulently induced to settle a tort claim because of discovery/litigation fraud, (s)he has two options: (1) to sue to rescind the settlement contract; or (2) to affirm the contract and sue for fraud. If (s)he chooses to sue for fraud, the remedy available to plaintiff is the fair compromise value of the claim at the time of settlement. In order to meet their burden of proving the fair compromise value at the time of settlement, Plaintiffs would need to meet this burden with expert lawyer testimony directed to the numerous compromise factors, and how they would have applied to each Plaintiff's case. Plaintiffs have not submitted the expert testimony required to sustain their burden of proof on the proper measure of damages in their cases. The deadlines for Plaintiffs to submit their final expert reports and amend their pleadings were October 15, 2004, and

> December 14, 2004, respectively. This court previously made clear that the expert reports were to be final and that the experts would not be allowed to testify on matters beyond their respective reports in its Order Related to Trial Procedures, filed May 6, 2004. Plaintiffs are therefore unable to prove the fact or amount of settlement fraud damages as a matter of law, and summary judgment is granted on all remaining claims herein.

App. A128-A125 (emphasis added); see also, A17-A18. The Circuit Court then entered Judgment on August 10, 2005 against Petitioners and dismissed their claims with prejudice. App. A119-A122.

Petitioners timely appealed the Judgment and entry of summary judgment to the Hawaii Supreme Court. Petitioners pointedly argued that no Hawaii precedent had ever mandated any of these requirements. App. A16; A30; A90. They also argued that (presuming the Circuit Court's ruling was upheld) their case should be reinstated to permit them opportunity to comply with the new damages standard and supplement their expert reports, and provide the new indicia. App. A72-A74.

On November 21, 2007, the Hawaii Supreme Court rendered its Decision, and affirmed the Circuit Court in all respects. App. A1-A83 (majority opinion). As part of its Opinion, the Hawaii Supreme Court acknowledged that the Circuit Court's rulings were inopposite to (then) existing Hawaii law. App. A34.[3] Nonetheless, the Court sustained the newly articulated limitation on damages for fraud, sustained the new evidentiary requirements, and confirmed summary judgment against Petitioners. App. A83.

B. The Hawaii Supreme Court's Decision

When Petitioners filed their subsequent suit, the law in Hawaii regarding liability and recovery for fraudulent inducement was plain:

> The evidence must be clear and convincing to support a finding of fraud. See Dobison v. Bank of Hawaii, 60 Haw. 225, 226, 587 P.2d 1234, 1235 (1978) (per curiam). The evidence must show that (1) false representations were made by defendants, (2) with knowledge of their falsity (or without knowledge of their truth or falsity), (3) in contemplation of plaintiff's reliance

[3] " . . . [T]his Court has not had the occasion to articulate what must be proven in order to bring a meritorious settlement fraud claim." App. A34.

> upon these false representations, and (4) plaintiff did rely upon them. Kang v. Harrington, 59 Haw. 652, 656, 587 P.2d 285, 289 (1978). Further, plaintiff must show that he suffered substantial pecuniary damage for "[t]he aim of compensation in deceit cases is to put the plaintiff in the position he would have been in had he not been defrauded.

Shanghai Inv. Co, Inc. v. Alteka Co., Ltd., 92 Haw. 482, 497-498, 993 P.2d 516, 531-532 (Haw. 2000) (emphasis added). See also, Hawaii Community Federal Credit Union v. Keka, 94 Haw. 213, 230, 11 P.3d 1, 18 (2000); Matsuura v. E. I. du Pont de Nemours and Co., 102 Haw. 149, 73 P.3d 687 (Haw. 2003).[4]

Hawaii law was also plain concerning the necessity and requirements for expert evidence:

> Where the subject matter is technical, scientific or medical and not of common observation or knowledge, expert testimony is allowed into evidence (citations omitted). Such testimony is to aid the jury in the determination of

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[4] The Matsuura decision was issued by the Hawaii Supreme Court specifically in response to certified questions from the Federal District Court in Hawaii in a parallel fraud action against DuPont.

> the issues involved and to provide a sufficient basis for the conclusion to be drawn by the jury rather than by conjecture and speculation (citations omitted). Expert testimony is not conclusive, and like any testimony, the jury may accept or reject it (citations omitted).

Bachran v. Morishige, 52 Haw. 61, 67, 469 P.2d 808, 812 (1971) (emphasis added). See also, Miyamoto v. Lum, 104 Haw. 1, 84 P.3d 509 (2004).

In spite of the above, the Hawaii Supreme Court chose to modify these established tenets after the fact, and without any advance warning. Regarding the requirement to limit a defrauded litigant's damages to the difference between the amount received, and the "fair settlement value" of his case, the Court stated: "[T]his court has not had the occasion to articulate what must be proven in order to bring a meritorious settlement fraud claim. To this end, Living Designs, Inc. v. E. I. Dupont Nemours & Co., 431 F.3d 353 (9th Cir. 2005) cert. denied, _____ U.S. _____, 126 S. Ct. 2861 (2006) is instructive." App. A34. In Living Designs, the Ninth Circuit reversed the federal district court's ruling in Matsuura v. E.I. du Pont de Nemours & Co., 330 F. Supp. 2d 1101 (D. Haw. 2004), reasoning that:

> . . . [w]hether the defrauded party could have won its case if it proceeded to trial is irrelevant to this calculation. The critical consideration is the settlement value of the case on the date settlement was reached. Such a determination is not beyond the power of a jury to determine.

App. A37, citing Living Designs, and relying upon DiSabatino v. United States Fidelity and Guarantee Co., 635 F.Supp. 350 (D.Del. 1986). The Hawaii Supreme Court continued:

> According to the DiSabatino court, the better approach is for the trier of fact to determine "the probable amount of settlement in the absence of fraud after considering all known or foreseeable facts and circumstances affecting the value of the claim on the date of settlement[;] the amount in settlement already received should [then] be deducted from this total amount.

App. A38-A39. The Supreme Court then concluded:

> [W]e believe that the method enunciated by the DiSabatino court and followed by the Ninth Circuit in Living Designs is persuasive. . .

> Consequently, we hold that the circuit court did not err in concluding that the measure of damages for the [Petitioners'] fraud action is the 'fair compromise value of the claim at the time of settlement.

App. A48 (emphasis added).[5]

Likewise with respect to the need for attorneys to testify as experts, and the actual content of their testimony, the Court also held:

> Although this case does not involve an attorney malpractice suit, the stated principle . . . that an issue concerning the interpretation of law requires expert assistance is applicable here. In our view, the determination of the fair value of what the [Petitioners] would have received had there been no fraudulent conduct at the time of settlement entails guidance from legal experts.

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[5] It is a matter of record that the Living Designs case was decided approximately 10 months after the Circuit Court had granted summary judgment in DuPont's favor. See, Living Designs, supra at 431 F.3d 353. In other words, the Hawaii Supreme Court literally relied on precedent which neither the Circuit Court nor Petitioners could have reviewed at the time the claims were dismissed.

> . . . In this respect, there are many variables that experienced lawyers routinely consider in weighing the potential risks and rewards inherent in going forward with litigation.

App. A54-55. The Court continued:

> [T]he question whether DuPont's fraudulent misrepresentation caused damage to the [Petitioners] . . . by preventing them from receiving the fair compromise value of their claims is one upon which the trier of fact must be guided by expert legal testimony.

App. A57.

Having decided the need existed for expert attorney evidence, the Court next turned to the question of the sufficiency of reports actually submitted by Petitioners: "In that regard, [Petitioners] presented reports from five attorneys, designated as experts, four of whom had litigated the the underlying product liability actions." App. A61. The Court found that Petitioners' expert attorney witnesses "offered essentially two opinions, to wit: that, if the [Petitioners] and/or their attorneys had known about the concealed evidence, (1) they would not have settled and would have proceeded to trial and (2) the valuation of the

[Petitioners'] cases would have been substantially higher." App. A67. The Court then agreed:

> [W]ith the circuit court's implicit ruling that the [Petitioner's] have not demonstrated the existence of a genuine issue of material fact as to damages to defeat summary judgment. . . . Of crucial importance is the fact that none of the attorney experts provide any opinion testimony . . . how DuPont's conduct affected the [Petitioners'] evaluation such that they would have settled for more, what each [Petitioner] claimed as his damages in the product liability cases at the time he settled . . . and how the settlement factors would apply to each [Petitioner's] case. It is not sufficient for an expert to simply state that he or she believed that, had the concealed evidence been known, the settlement value would have been greater because the existence of the concealed evidence strengthened the then liability aspect of the litigation.

App. A67-A68 (emphasis added).

The Court acknowledged that it was changing established law, and that Petitioners had been denied the opportunity to present the necessary expert evidence, i.e. since the Circuit Court's ruling

was rendered after the deadline for filing expert reports had passed. It held, however, that this was of no concern since Petitioners had been entitled to request postponement of DuPont's motion to supplement their submissions.

> [T]he [Petitioners] believe that because it was "unknown" and "not foreseeable" that the circuit court would adopt the fair compromise value as the measure of damages in settlement fraud actions, their case should be remanded to allow their legal experts an opportunity to present their opinions regarding the fair compromise value of the case absent the fraud . . . [T]he opportunity the [Petitioners] now seek . . . was available to them, via [Rule 56(f) of the Hawaii Rules Of Civil Procedure] at the time the circuit court was considering DuPont's motion for summary judgment. . . . Rule 56(f) – like its federal counterpart . . . provides a mechanism for litigants to seek a continuance or avoid summary judgment when they "need [ ] to discover essential facts" to justify their opposition.

App. A73-A75 (emphasis added).

Having failed to do so, the Court held that there was no basis to reinstate the case to permit Petitioners this opportunity:

> Here, rather than request a continuance of the hearing "to permit affidavits to be obtained or depositions to be taken or discovery to be had" . . . the [Petitioners] continued to assert their contrary position on damages, disregarding DuPont's position and the fact that the circuit court might be persuaded to adopt DuPont's view of the measure of damages.

App. A77 (emphasis added). The Court then held: "Having failed to request a Rule 56(f) continuance . . . in our view, the [Petitioners] waived their opportunity to secure further opinions from the experts to submit to the circuit court and cannot now raise it on appeal." App. A80.

The Dissenting Opinion noted the inherent fallacy in this Decision:

> . . . [I]n the February 28, 2005 summary judgment Order [footnote omitted] itself, the court for first time declared that the remedy for fraud was "the fair compromise value of the claim at the time of settlement and that in order to meet their burden of proving the fair compromise value at the time of

> settlement," and that . . . [Petitioners] would need to [submit] expert lawyer testimony directed to the numerous compromise factors, and how they would have applied to each [Petitioner's] case . . . it was not until that February 28, 2005 order, which granted the motion for summary judgment, that [Petitioners] were made aware of the specific standard to which their response to Defendant's summary judgment motion would be held . . .

App. A85-A87. The Dissent pointed out:

> . . . [T]he court did not require that the experts produce a settlement value, a judgment value, any other specific dollar amount related to damages, or that the experts set forth factors according to a particular standard by which damages must be measured. No party was ordered to submit evidence regarding compromise factors in advance of the summary judgment hearing, nor was the designated damages standard defined . . . [I]t was not until the February 28, 2005 Order . . . that [Petitioners] were made aware of the specific standard to which their response would be held . . .

App. A93 (emphasis added). The Dissent also noted:

> [Petitioners] had no notice that their experts were required to provide "testimony directed to the numerous compromise factors," because until the court decided the summary judgment motion, it had not determined that "the fair compromise value" standard would govern in the case . . .

App. A94. The Dissent further noted the major deficiency:

> Manifestly, it is the lack of notice that . . . unfairly prejudices [Petitioners] here. . . . The majority's position . . . does not address the central issue here, namely that when [Petitioners] submitted their final expert reports, they were not on notice of the governing measure of damages subsequently announced in the court's February 28, 2005 order.
>
> . . . To fault [Petitioners] ex post facto for producing only expert testimony directed to their proposed standard of damages . . . deprives [Petitioners] of their right to a trial on their claims.

App. A116-A117 (emphasis added).

The Dissenting Opinion also noted that a postponement under Rule 56(f) would not have cured the deficiency:

> The majority's assertion that [Petitioners] should have moved for a Rule 56(f) continuance of the summary judgment hearing . . . is even more incongruous inasmuch as there was no way to anticipate before the hearing was held that the court would adopt [DuPont's] standard of damages and apply it to [Petitioner's] expert testimony . . .

App. A112. [T]he purported need for such a continuance could only become apparent after the court decided what damages standard would apply at the hearing. App. A109.

> As pointed out before, the defect in [the Majority's] reasoning is that [Petitioners] would have needed to know what specific standard the court would eventually decide governed in order to have a basis requesting a continuance pursuant to HRCP Rule 56(f) . . .

* * * *

> . . . That aside . . . the majority ignores the manifest language of the [circuit c]ourt's order granting [DuPont's] summary judgment motion that "the expert reports were to be final and that the experts would not be allowed to testify on matters beyond their respective reports[.] . . . The court plainly related in its February 25, 2005 order that it would not have considered any continuance . . .
>
> . . . To say, then, that [Petitioners] should have moved to continue once [DuPont] filed its motion for summary judgment is to fault [Petitioners] for following the court order . . .

App. A114-A115 (emphasis added and in original).

> Under the circumstances above, it cannot be reasonably concluded that [Petitioners] had notice of the standard the court would impose on the evidence they had marshaled in opposition to [DuPont's] summary judgment motion, or that [DuPont] has convincingly

> established its entitlement to summary judgment.

App. A118 (emphasis added).

In light of the above, Petitioners respectfully submit that their constitutional rights to due process were violated, and that this Court should now order further review.

REASONS FOR GRANTING A WRIT OF CERTIORARI

The Fifth Amendment to the United States Constitution, made applicable on the respective States through the Fourteenth Amendment, specifies that parties may not be deprived of life, liberty or property rights without due process of law. Board Of Regents Of State Colleges v. Roth, 408 U.S. 564, 92 S.Ct. 2701 (1972); Hormel v. Helvering, 312 U.S. 552, 61 S. Ct. 719 (1941). Such "property" rights have been expressly held to encompass civil causes of actions and claims. Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S. Ct. 1148 (1982) ("[A] cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause); see also, Hammond Packing Co. v. Arkansas, 212 U.S. 322, 349-351, 29 S.Ct. 370, 379-380, 53 L.Ed. 530 (1909); Hovey v. Elliott, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897); Windsor v. McVeigh, 93 U.S. 274, 23 L.Ed. 914 (1876).

This conclusion is hardly a novel one. The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances. In Societe Internationale v. Rogers, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958), for example-where a plaintiff's claim had been dismissed for failure to comply with a trial court's order, the Court read the 'property' component of the Fifth Amendment's Due Process Clause to impose 'constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.' Id., at 209, 78 S.Ct., at 1094 . . . Similarly, the Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be 'the equivalent of denying them an opportunity to be heard upon their claimed right[s].' Boddie v. Connecticut, 401 U.S. 371, 380, 91 S.Ct. 780, 787, 28 L.Ed.2d 113 (1971).

Logan at 455 U.S. 430 - 431, 102 S.Ct. 1154 - 1155 (emphasis added).

The Federal Courts have held that "due process guarantees" that there must be "a fair decisionmaking process before official action is taken which directly impairs a person's life, liberty or property." Banker's Trust Co. v. Bethlehem Steel Corp., 752 F.2d 874, 886 (3d. Cir. 1985); Hardy v. Johns-Manville Sales Corp., 681 F.2d 334 (9th Cir. 1982) ("The right to a full and fair opportunity to litigate an issue is, of course, protected by the due process clause of the United States Constitution"). Stated differently:

> Due process mandates that a judicial proceeding give all parties an opportunity to be heard on the critical and decisive allegations which go to the core of the parties' claim or defense and to present evidence on the contested facts.

Banker's Trust, at 752 F.2d 890 (emphasis added). See also, Jackson v. DeSoto Parish School Board, 585 F.2d 726, 730 (5th Cir.1978); Thompson v. Madison County Board of Education, 476 F.2d 676, 678 (5th Cir.1973). The Ninth Circuit has noted:

> At its core, due process requires that a party have adequate notice and opportunity to be heard (citations omitted). In considering whether a . . . court accorded adequate due process, appellate courts must look at the actual substance, not the name or form, of the procedure to see if the claimants' interests were adequately safeguarded.

U.S. v. Alisal Water Corp., 431 F.3d 643, 657 (9th Cir. 2005) (emphasis added). This Court has added:

> As our decisions have emphasized time and again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged. . . . To put it as plainly as possible, the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement.

Logan at 455 U.S. 434 - 435, 102 S.Ct. 1157-1158 (emphasis added).

The hallmark of due process is adequate notice and a fair opportunity to be heard. Dusenberry v. U.S., 534 U.S. 161, 122 S.Ct. 694 (2002); U.S. v. James Daniel Good Real Prop., 510 U.S. 43, 114 S.Ct. 492 (1993); Mullane v. Central

Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652 (1950). In this respect:

> [A]s we explained in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), the right to be heard ensured by the guarantee of due process "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to . . . contest." . . . Our . . . concern is . . . with the question whether the plaintiff has been accorded due process in the primary sense, whether it has had an opportunity to present its case and be heard in its support. While it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

Richards v. Jefferson County, Ala., 517 U.S. 793, 804, 116 S. Ct. 1761, 1768 (1996) (emphasis added). This Court has also held:

> The State may erect reasonable procedural requirements for triggering the right to an adjudication, be they statutes of limitations (citations omitted) or, in an appropriate case, filing fees (citations omitted). And the State certainly accords due process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule. (citations omitted). What the Fourteenth Amendment does require, however, 'is an opportunity . . . granted at a meaningful time and in a meaningful manner (citations omitted), for a hearing appropriate to the nature of the case.

Logan at 455 U.S. 437, 102 S.Ct. 1158-1159 (emphasis added). See also, Armstrong v. Manzo, 380 U.S. 545, 85 S. Ct. 1187 (1965).

In this case, Petitioners were denied adequate notice, and an opportunity to be fairly heard before being were deprived of their claims. There is no dispute that the Circuit Court provided Petitioners with formal process, and an actual hearing before it rendered its decision; it is equally true that the notice and hearing accorded were totally inadequate and unfair in the extreme. Petitioners were summarily eviscerated of their claims without any advance warning, or meaningful occasion to satisfy the evidentiary perquisites, or comply with the new standard for damages adopted by the Circuit Court,

and subsequently affirmed by the Hawaii Supreme Court - on an acknowledged ex post facto basis.

The record in the case makes this glaringly apparent: at the time this controversy first arose, the formula for computing damages for Petitioners' fraud claims was still being disputed by the parties. DuPont contended that Petitioners were limited to the difference between the settlement amounts they originally received, and the amount of a "fair settlement," i.e. one that was objectively achievable had there been no fraud. Petitioners, in accordance with then existing Hawaii precedent, claimed they were entitled to all damages proximately arising from DuPont's fraudulent discovery tactics, - and (again) both the Circuit Court and the Hawaii Supreme Court had previously confirmed that such fraud had, in fact, been so committed. See Kawamata, supra. To that point in time (and the record is plain), the established law in Hawaii clearly supported Petitioners' position; indeed, there is scarcely any suggestion otherwise.

On May 6, 2004, approximately 9 months before DuPont filed its February 3, 2005 motion for summary judgment, Petitioners were instructed by the Circuit Court to designate their experts, and provide "final" expert reports on areas of testimony to be elicited at trial. No warning was ever provided that the Court would require that the experts be of a particular occupation or persuasion. Nor was there any intimation that the content of their testimonies would have to conform to certain pre-set mandates,

or evidentiary prerequisites. Nothing of this nature was ever declared or announced.

What was articulated, however, was that the Circuit Court intended to preempt all supplementation or amendment of all expert reports. Thus, once a report was submitted, it was, for all intents and purposes, etched in stone; it could not be modified or changed regardless of circumstance. The Circuit Court itself had previously noted that such revisions would be inadmissible – and the parties were obviously bound by that advance edict.

This, then, was the setting for DuPont's motion for summary judgment – and it is respectfully submitted that the end result constitutes a complete miscarriage of justice. The Circuit Court held that DuPont's proffered methodology for damages was correct, and that Petitioners' proposed formula (in spite of its consistency with existing law) was not. It then held that all of the expert reports which Petitioners submitted in opposition to the motion were inadequate, i.e. since they failed to address the Court's newly established standard. How (in the circumstances) this could viably have been accomplished was left completely unsaid; but so far as the Circuit Court was concerned, Petitioners' proof was deficient since they failed to divine the Court's future disposition when they first submitted their final reports, i.e. before the new standards and requirements were even adopted.

Petitioners appealed the result to the Hawaii Supreme Court to no avail. That body, while acknowledging that the method for determining such damages was never previously determined, affirmed the lower Decision, and held that Petitioners should have "foreseen" that the Circuit Court would agree with DuPont's proposed formula. It then held that Petitioners lacked the necessary expert evidence demonstrating that they could satisfy this new found, "fair settlement" standard at trial. All of this occurred despite the inescapable fact that Petitioners were never notified of the need for such evidence beforehand, or provided with a legitimate opportunity to submit such proof. The Dissenting Opinion in the Hawaii Supreme Court's Decision referenced this obvious fact:

> It is true that [Petitioners] were put on notice that [DuPont] advocated a different standard of damages when the motion for summary judgment was filed, but that was the matter in dispute. [DuPont's] motion for summary judgment did not constitute binding law that [Petitioners] were obligated to follow . . . [I]t was not until the court ruled on the motion for summary judgment that [Petitioners] were made aware of what the controlling law would be regarding damages for this case. They could not be expected to produce witness testimony relating to an unannounced

> standard under such circumstances . . . [Petitioners] opposition was premised on a different standard of damages that was in contention with [DuPont's] standard at that point. In essence, the majority's decision would require [Petitioners] to assume [DuPont] would prevail on summary judgment and abandon their arguments that the controlling standard was not the fair compromise value of the products liability claims.

App. A94-95, footnote 3, dissenting opinion (emphasis added).

Nor can it fairly be said that Petitioners "waived" such opportunity by failing to avail themselves of whatever relief may have arguably been available through Rule 56(f). In their Opening Brief to the Hawaii Supreme Court, Petitioners pointedly requested that the Court remand the case to permit supplementation of their submissions, if the newly established evidentiary standards and limitations on damages were affirmed on appeal. The Court rejected that request; lecturing that since Petitioners had failed beforehand, to move for a continuance of the summary judgment motion under the Rule, remand would impermissibly allow them "two bites of the apple." App. A79. The metaphor is transparent, as well as inaccurate: in truth, Petitioners were never provided with a first,

or second "bite" at this elusive target. The Dissenting Opinion notes this point in full:

> Not surprisingly, the, HRCP Rule 56(f) is not raised by the [Petitioners] or by [DuPont]. This is understandable because it was is wholly irrelevant to the facts. Instead, it is the majority that raises HRCP Rule 56(f) sua sponte as the construct by which the majority rationalizes its outcome.

App. A109 (emphasis added).

> [Petitioners] could not have appropriately moved to continue the decision on [DuPont's] motion for summary judgment because the February 28, 2005 court order reiterated the court had precluded any further revision of expert testimony . . . The court then stated that it previously made clear that the expert reports were to be final. Thus, in deciding that [Petitioners] are therefore unable to prove fraud damages as a matter of law . . . the court made abundantly plain that it would not have considered any continuance under Rule 56(f) were that Rule even relevant to this case.

App. A111 (emphasis added and in original).

Petitioners respectfully submit when thus viewed, it is manifest they were deprived of their property rights without due process of law. It is one thing to lack sufficient evidence to substantiate one's claim; it is another thing entirely to be denied all notice and viable opportunity to submit an adequate showing to survive summary judgment, i.e. because the State Courts choose to change established law, and procedure ex post facto without notice. In this case, the formula for damages, as well as the evidentiary standards for establishing the formula were determined after the fact, and after Petitioners' ability to submit sufficient proof had been effectively foreclosed. The net result was Petitioners were summarily stripped of their claims, and denied their due process rights to vindicate their cause. The outcome of this case was both wrong and unfair in the extreme, and should now be reviewed by this Honorable Court.

CONCLUSION

Based on the foregoing points and authorities, Petitioners Samuel H. Taka & Sylvia A. Taka d/b/a S. Taka and Albert Isa d/b/a Albert Isa Nursery respectfully request that the Petition for Writ of Certiorari should be granted.

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Honolulu, Hawaii

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